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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 658

SHREVEPORT TELEVISION COMPANY, *Petitioner*

vs.

FEDERAL COMMUNICATIONS COMMISSION

and

SOUTHLAND TELEVISION COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Shreveport Television Company, petitioner,[1] prays that a writ of certiorari issue to review the order of

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[1] Shreveport Television Company is a Louisiana partnership originally comprising Don George, Henry E. Linam, Ben Beckham Jr., and Carter Henderson. Since the Commission decision herein, Don George has died. His 43% interest is held by his executrix; and under the terms of the partnership agreement, its affairs are to be carried on by the surviving partners.

the United States Court of Appeals for the District of Columbia Circuit entered herein on October 2, 1956.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is unreported and is printed in full as Appendix A hereto, *infra*, p. 1a.

JURISDICTION

The judgment of the Court of Appeals, in the form of an order vacating a decision of the Federal Communications Commission and remanding the case to the Commission, was entered on October 2, 1956; and the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and 47 U.S.C. § 402(j).

QUESTION PRESENTED

Whether the Court of Appeals upon appeal from a final decision of the Federal Communications Commission pursuant to 47 U.S.C. § 402(b), may vacate the Commission decision and remand for further consideration by reason of an event which occurred after the Commission decision had become final and while the appeal therefrom was pending.

STATUTES INVOLVED

The statutory provisions are Sections 402(b) - (j) and Section 405 of the Communications Act of 1934, Act of June 7, 1934, c. 652, §§ 402(b) - (j) and 405, 48 Stat. 1093, 1095, as amended, 47 U.S.C. §§ 402(b)-(j) and 405; and Act of June 11, 1946, c. 324, § 10, 60 Stat. 243, 5 U.S.C. 1009(e). All are set forth in full in Appendix B hereto, *infra* pp. 1a-7a.

STATEMENT

Petitioner and respondent Southland Television Company applied for permits for the same television facility at Shreveport, Louisiana. These applications being mutually exclusive, the respondent Commission designated them for comparative hearing on May 20, 1953, together with that of a third applicant which has since abandoned the case.

The case was fully heard by an examiner who issued a decision in favor of petitioner on June 7, 1954. On May 20, 1955, the Commission, after the filing of extensive exceptions and briefs and after hearing oral argument, issued its final decision, also in favor of petitioner.

The competing applicant which has since dropped out filed a timely appeal with the Court of Appeals and respondent Southland Television Company petitioned the Commission for Rehearing and Reconsideration. The latter petition was denied by the Commission on November 17, 1955, and respondent appealed to the Court of Appeals on December 15, 1955, invoking its jurisdiction under 47 U.S.C. 402(b). In the meantime petitioner, at great expense, has constructed and put into operation the first television station to bring service to the Shreveport area.

On June 5, 1956, after briefs had been filed and the case was awaiting argument in the Court of Appeals, Don George, one of the partners comprising the petitioner, died. Petitioner filed the requisite suggestion of death with the Court of Appeals; and on June 11, 1956, respondent Southland Television Company moved the Court to remand the case to the Federal Communications Commission for further consideration based on the fact of Don George's death.

Both Petitioner and the Commission opposed the motion to remand on the ground that the sole issue before the Court was the correctness of the Commission's decision on the record before it when that decision was rendered. The Court of Appeals nevertheless entered its *per curiam* order of October 2, 1956, vacating the decision of the Commission and remanding the case to the Commission "with directions to reconsider its decision in the light of the circumstance that, by reason of the death of Mr. Don George, the fact to which the Commission attached greatest weight[2] no longer exists".

REASONS FOR GRANTING THE WRIT

1. The ruling of the Court below raises questions of central importance in the field of judicial review of administrative decisions, and, more specifically, in respect of "the distribution of judicial authority under the Communications Act of 1934 . . .". *Federal Communications Commission* v. *Columbia Broadcasting System,* 311 U.S. 132, 133, 61 S. Ct. 152 (1940). The Court below has ruled that the pendency of proceedings for judicial review of a final order of the Communications Commission postpones the point at which the comparative proceeding before the administrative agency terminates. It thus confuses the spheres allocated by Congress to the judicial and administrative processes respectively. This action by

[2] It is only one of the vices of the lower court's method of handling this case that permits this sort of a conclusion in advance of having examined the Commission's decision and deciding its correctness upon the record before it. In fact, many other factors which were not affected by Mr. George's death were given significance; and it cannot be said on superficial examination that Mr. George's participation was of overriding importance.

the United States Court of Appeals for the District of Columbia Circuit is in conflict with the basic scheme of the Communications Act and with the applicable decisions of this Court.

2. The ruling of the Court below is plainly contrary to specific provisions of the statute governing its jurisdiction and procedure on appeal from the Federal Communications Commission. This is, again, a matter of importance because the Court below is the only court given jurisdiction of appeals from the instant type of proceeding before the Commission; there can, consequently, arise no conflict among the circuits, and the Circuit Court of Appeals for the District of Columbia has more than once made plain its adherence to the erroneous course it now pursues.

I. THE ISSUE AS TO THE DISTRIBUTION OF ADMINISTRATIVE AND JUDICIAL POWER

The action of the Court below represents a bald usurpation by the Court of the Commission's discretion in respect of reopening. Indeed, since the record had been closed and the period for requesting rehearing had expired, it is probable, as is argued below, that it usurped a discretion the Commission itself no longer had. No appeal, by request for rehearing, had ever been made to the Commission's discretion on the matter of Don George's death.[3] The Court did not

[3] Respondent Southland Television Company's petition for rehearing was on entirely different grounds, had been denied before Don George's death and had no effect whatever in the decision of the lower Court. This action by the Court is inconsistent with its own ruling in *Black River Valley Broadcasting Co.* v. *McNinch*, 69 App. D.C. 311, 101 F. 2d 235, cert. den. 307 U.S. 623, 59 S. Ct. 793 (1939), which requires exhaustion of the administrative remedy of rehearing, once invoked, prior to appeal.

remand for the purpose of directing the Commission to exercise the discretion it had never previously had the opportunity to exercise. It "vacated" the Commission's decision because of an event which had not yet occurred when that decision became final.

The summary character of the order of remand issued by the Court below gives no clue to the rationale on which it acted. It has elsewhere been quite specific, however. In *W. S. Butterfield, Inc.* v. *Federal Communications Commission,* U.S. App. D.C. , F. 2d (Nos. 12527, 12666, 12752 decided May 24, 1956), the Court of Appeals for the District of Columbia Circuit was faced with a case similar to the instant one, except that a reopening and rehearing had been requested of the Commission on the basis of changed circumstances (which arose after its decision, but before a previous rehearing petition had been acted upon) and had been denied.

The Court said (slip opinion page 3):

> "We held in *Enterprise Co.* v. *Federal Communications Commission* (U.S. App. D.C. , 231 F.2d 708, 712-13) that the Commission had erred in not reopening the record to receive evidence as to events transpiring before its determination of the petition for rehearing . . . . Our decision in *Enterprise* was not limited to events occurring before decision of petitions for rehearing . . . . We said that we were laying aside the question of whether there was a *right* to reopening of the record to include events occurring after filing of petitions for rehearing. We confined ourselves to holding that the Commission had power to reopen and that, in the circumstances of that case, it was an abuse of discretion not to exercise that power".

Thus the Court made it clear that it recognized a discretion in the Commission over reopening, and found it abused. It then went on to elaborate on the time within which such a discretion could (and should, as it thought) be exercised:

> "We pointed out that the Commission's power to reopen the record was coextensive with its jurisdiction over the order it has made and that such jurisdiction existed until the time to appeal had expired".

Following this sentence the Court inserted a footnote reading as follows:

> "Albertson v. Federal Communications Commission. 87 U.S. App. D.C. 39, 41-42, 182 F.2d 397, 399-400 (1950). As to events occurring during pendency of appeal, see Fleming v. Federal Communications Commission, 96 U.S. App. D.C. 223, 226, 225 F.2d 523, 526 (1955)".

It was thus made explicit that, as was held in *Fleming* and again in the instant case, both the Commission's discretion and the Court's power to compel its exercise extend to all events occurring while an appeal from a Commission is pending.[4]

This holding contains a tacit but none the less apparent misconception of the Court's function in such appellate proceedings. The Commission is, of course, required to reach its decision in comparative

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[4] In *Enterprise Co.* v. *Federal Communications Commission*, 231 F. 2d *supra* at p. 712, the Court stated: "As we held in Albertson v. Federal Communications Commission, 87 U.S. App. D.C. 39, 41-42, 182 F. 2d 397, 399-401, jurisdiction over an order remains with the Commission until the time for appeal has expired. . . . See, also, Fleming v. Federal Communications Commission, 96 U.S. App. D.C. 223, 225 F. 2d 523".

cases, such as the present one, upon the record before it. Once it has done so, the Court is empowered only to pass upon whether it has acted correctly. The pendency of an appeal alleging error could hold the comparative proceeding open only if the Court were acting as a higher administrative tribunal with authority to reach its own decision on the merits. From the holdings in *Butterfield, Fleming* and the instant case, it is evident that the Court of Appeals does not believe the comparative phase of the administrative hearing is finally concluded by the Commission's decision and expiration of the period allowed for rehearing. Finality must in its view await upon decision of the appeal.

It is clear that this view is in error. Indeed, this is especially clear in respect of the Court of Appeals for the District and its relations with the Communications Commission, because at one time that Court was given such administrative authority over the predecessor of the present Commission and later was expressly deprived of it. Section 16 of the Radio Act of 1927 directed the Court of Appeals for the District, upon appeal, to "hear review and determine the appeal" upon the record made before the Commission and upon such additional evidence as the Court might receive, and the Court was empowered to "alter or revise the decision appealed from and enter such judgment as to it may seem just". (44 Stat. 1169, 47 U.S.C. § 96). The Supreme Court held in *Federal Radio Commission* v. *General Electric Co.,* 281 U.S. 464, 50 S. Ct. 389 (1930), that this provision made the Court of Appeals "a superior and revising agency" in the administrative field, and, in consequence, that

its decision on an appeal from the Commission was not a judicial judgment reviewable by the Supreme Court.

Following this decision, Congress, by the Act of July 1, 1930, c. 788, amended § 16 of the Radio Act of 1927 expressly to limit the review by the Court of Appeals to "questions of law", and provided "that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious". (47 U.S.C. § 96).

In *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U.S. 266, 53 S. Ct. 627 (1933), the Supreme Court had occasion to determine the effect of this alteration of the review powers of the Court of Appeals. It said (289 U.S. at p. 276):

> "This limitation is in sharp contrast with the previous grant of authority. No longer is the Court entitled to revise the Commission's decision and to enter such judgment as the Court may think just. The limitation manifestly demands judicial, as distinguished from administrative, review".

There seems no doubt that the purpose of the present § 402 of Title 47 U.S.C., which superseded § 16 of the Radio Act of 1927 as amended, carried forward this limitation on the scope of the Court of Appeals' powers of review. *See e.g. Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 60 S. Ct. 437 (1940).

The Court of Appeals first intimated that the provision for judicial review under powers so limited holds open the administrative decision in *Albertson* v. *Federal Communications Commission*, 87 U.S. App.

D.C. 39, 182 F.2d 397 (1950). The Court there held that jurisdiction over a contested order remains with the Commission during the period for taking an appeal. It cited as authority *Babler* v. *United States,* 137 F.2d 98 (CCA 8, 1943), and *United States ex rel. Harrington* v. *Schlotfeldt,* 136 F.2d 935 (CCA 7, 1943).

Both of the cited cases concerned the question of the jurisdiction of a lower federal court over matters occurring during the period for appeal to a higher court. Their citation as governing the question of the Commission's power over its orders completely overlooks what Mr. Justice Frankfurter has cogently pointed out in the *Pottsville* case *supra* with respect to a mandate from the Court of Appeals to the Commission. There, at p. 141 of the official reporter, he said:

> "This was not a mandate from court to court but from a court to an administrative agency. What is in issue is not the relationship of the federal courts inter se—a relationship defined largely by the courts themselves—but the due observance by the courts of the distribution made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution".

This vital distinction results in a situation where the procedural rules of the reviewing court are totally unrelated to the functions of the agency reviewed. As Mr. Justice Frankfurter further said (ibid.):

> "A review by a federal court of the action of a lower court is only one phase of a unified process. But to the extent that a federal court is authorized to review an administrative act there is superimposed upon the enforcement of legislative

> policy through administrative control a different process from that out of which the administrative action under review ensued".

It would seem abundantly clear from this that there is not, as *Albertson* holds, any relation between the period provided for seeking review in the judicial process and the finality of the action taken in the administrative process. Therefore, when *Butterfield, supra,* and, by inference, *Fleming, supra,* and the instant case followed *Albertson* and extended it to cover the period during which appeal was pending, they were plainly wrong.

The consequences of this error are not minor. The cases already cited show that this Court has regarded the conceptual error here illustrated as warranting correction in proceedings by way of certiorari. In addition, however, the particular ruling below which is sought to be reviewed here has wide-ranging practical consequences which rise to a level of importance warranting their correction also.

The nature of these consequences could find no better elucidation than the words of this Court in *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503, 514-15, 64 S. Ct. 1129, 1134-5 (1944):

> "Administrative consideration of evidence — particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might

> demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise, it has been considered that the discretion to be invoked was that the body making the order, and not that of a reviewing body".

The Court then goes on to point out that only once in the history of administrative law has it reversed a Commission as having abused its discretion by refusal to grant a rehearing because of facts arising after decision. *Atchison, T. & S. F. R. Co.* v. *United States,* 284 U.S. 248, 52 S. Ct. 146 (1932); and in its subsequent discussion (id. at pp. 515-17) it makes clear the insecure status of that case as authority. Cf. *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 534-5, 66 S. Ct. 687, 697 (1946).

The *Atchison* case is, moreover, clearly distinguishable from the one here presented. There the Interstate Commerce Commission had closed its record in 1928 and proposed to make effective in 1931 rates based on the old record despite an intervening petition for rehearing alleging changed circumstances. Here the Commission has taken final action based on the state of affairs extant at the time it acted, and it does not propose to take later action against anyone subject to its jurisdiction in the face of intervening change; nor has it had before it or rejected a timely petition for rehearing alleging such change.

If the teaching of *Interstate Commerce Commission* v. *Jersey City, supra,* is to be ignored, as was done below, the results will endanger the orderly functioning of the administrative process. Already a single Commission has twice in slightly over a year (in *Fleming, supra,* and the instant case) been ordered to reopen a case it considered closed—and that without any finding by the Court of Appeals that there was error of any sort in the decision under review. In each case the occasion for reopening was the death of a partner in one of competing applicants which occurred after the Commission's decision became final but while an appeal to the Court of Appeals was pending. If this can be done because of death, presumably a similar result will ensue when there is a change in any other significant factor upon which the Commission's decision was based.

In view of the length of the appellate process, it must be anticipated that many such changes will occur in the factors underlying the final administrative decisions of many agencies, with a consequent burden on the agencies of required reopenings and reconsiderations which may well prove insupportable. The burden on the agency directly affected here will be especially heavy because, under the holding in *Johnston Broadcasting Co.* v. *Federal Communications Commission,* 86 U.S. App. D.C. 40, 175 F.2d 351 (1949), an exceptionally wide range of factors is held to be significant in this Commission's determination of comparative cases.

II. THE SPECIFIC STATUTORY PROCEDURE FOR REVIEW

The Communications Act, as amended, provides specifically the time within which applications for re-

hearing are to be made. 47 U.S.C. § 405. Once the thirty days there afforded an applicant has expired, he is finally concluded and loses his standing to be treated as a competing applicant (subject only to the possibility that, upon appeal, the Commission may be held to have committed error in finding against him). *KFAB Broadcasting Co.* v. *Federal Communications Commission,* 96 U.S. App. D.C. 268, 225 F.2d 560; cert. den. 350 U.S. 923, 76 S. Ct. 212 (1955).

Parenthetically, it should be re-emphasized that the Court of Appeals has not found that the Commission was in error in the decision here under review. It has simply held, in effect, that respondent Southland Television Company must be treated as retaining its status as a competing applicant throughout the appeal process.

At the outset it should be pointed out that there is no possible argument that only by so holding can the interest of the public in the character of broadcasters be upheld. Final termination of the opportunity for competing applicants to seek reopening of a comparative hearing, which § 405 plainly contemplates, does not in any sense terminate the Commission's power to protect the public interest from any injury threatened by changes in the composition of the successful applicant, or in its operations, whenever they may occur. The Commission has ample powers to vindicate the public interest by revoking the permit it has issued if at any time conditions come to its attention which would have warranted a refusal to grant it originally. 47 U.S.C. § 312 (a) (2).

Similarly, any change amounting to a transfer of control, such as the involuntary transfer effected by

the death of Don George in the instant case, must have the approval of the Commission upon an affirmative finding that the transfer will serve the public interest. 47 U.S.C. § 310(b).[5] Further, the Commission has and exercises broad supervisory powers over all operations of its permittees and licensees at the periodic renewal dates when, as required by 47 U.S.C. § 307(d), the Commission determines that renewal will be in the public interest.

With the public interest thus protected, there is no occasion for the Court of Appeals to stretch, as it has done, the scope of review conferred upon it by 47 U.S.C. § 402. That Section, in Subsection (g), requires that the Court determine the appeal "upon the record before it". Subsection (d) of the same Section throws additional light upon what record is meant by this phrase. It is there required that:

> "The Commission shall file with the court a copy of the order complained of, a full statement in writing of the facts and grounds relied on by it in support of the order involved upon said appeal, and the originals or certified copies of all papers and evidence presented to and considered by it in entering said order".

It is apparent that all of the material so required is simply the record upon which the Commission reached its decision from which appeal is taken. There is complete absence of any suggestion that there is to be brought to the Court of Appeals in the first instance any material subsequently arising and which, by hypothesis, the Commission did not consider in

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[5] Such approval has been obtained by Petitioner pursuant to Commission procedure therefor.

reaching its decision. Moreover, the language of § 405 of the Act, dealing with rehearing, is eloquent in showing the Act's intention that there shall not be reviewed on appeal facts other than those in the Commission record. Thus, it is there provided:

> "The filing of a petition for rehearing shall not be a condition precedent to judicial review . . . except where the party seeking such review . . . relies on questions of fact or law upon which the Commission has been afforded no opportunity to pass".

By this provision, a petition for rehearing becomes a prerequisite to review when new facts are relied on. Accordingly, it is apparent that the statutory scheme of judicial review contemplates solely review of the Commission's decision on the record before it and gives the Court of Appeals no authority to hold open during the pendency of an appeal the record the Commission has closed and which, under the statute governing the Commission, is no longer subject to reopening by the only method provided for that purpose—a petition to the Commission for rehearing.

As has been aptly said in another context:

> "No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do". *Scripps Howard Radio* v. *Federal Communications Commission,* 316 U.S. 4, 9, 62 S. Ct. 875, 879 (1942).

This fact of inevitable change cannot, however, justify the court in seeking to remedy such changes by the expedient of holding open the administrative proceeding on a comparative basis beyond the time appointed

by statute for its final closing. Finality must come somewhere, and it is for the Commission, not the Court, to deal with subsequent changes which affect the permit or license which it has issued and over which it has exclusive and continuing jurisdiction in the public interest. This the United States Court of Appeals for the District of Columbia has utterly failed to understand.

CONCLUSION

It is therefore respectfully submitted that a writ of certiorari should issue herein for the purpose of clarifying once again the necessity for "due observance by the courts of the distribution made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution". *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 141, 60 S. Ct. 437, 440-1 (1946), and of clarifying the proper application of 47 U.S.C. §§ 402 (b), (d), (g) and 405.

Respectfully submitted,

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December 28, 1956